

**Regular Second Appeal No.4036 of 2011 (O&M)** { 1 }

IN THE HIGH COURT OF PUNJAB AND HARYANA AT  
CHANDIGARH

R.S.A.No.4036 of 2011 (O&M) &  
Cross-objection No.22-C of 2016 (O&M)  
Date of Decision: August 5<sup>th</sup>, 2016

Sawaran Singh

...Appellant

Versus

Pargat Singh (since deceased) through L.Rs and others

...Respondents

**CORAM: HON'BLE MR.JUSTICE AMIT RAWAL, JUDGE**

Present: Mr.Abhinav Jain, Advocate,  
for the appellant.

Mr.Divyadeep Walia, Advocate,  
for respondent Nos.1 to 5.

\*\*\*\*\*

**AMIT RAWAL, J. (Oral)**

Appellant-plaintiff is aggrieved of the judgment and decree of the Lower Appellate Court, whereby discretion exercised by the trial Court vide judgment and decree dated 8.8.2008, has been converted into suit for recovery of the earnest money.

Mr.Abhinav Jain, learned counsel for the appellant-plaintiff submits that suit Civil Suit No.188-1 dated 25.4.2003 was filed for specific performance of the agreement to sell dated 14.6.2001 in respect

of land measuring 74 kanals 6 marlas @ ₹1,50,000/- per acre in respect of Village Hassan Bhatti (wrongly mentioned in the plaint as Village Kabalwala). Earnest money of ₹9,00,000/-, i.e., ₹4,00,000/- by cheque and ₹5,00,000/- by cash has been paid. He further submits that during the pendency of the suit, an application seeking correction of the village was filed and the same was allowed by the trial Court vide order dated 25.4.2003. Copy of the order has been annexed as Annexure A-3. Before the trial Court, the agreement to sell had been proved through the testimony of witnesses, namely, Swaran Singh plaintiff himself, Ravit Bhatia, Harpreet Singh, Bhajan Singh and Sukhmander Singh. The agreement to sell was executed on behalf of the appellant through Harpreet Singh, who has also been examined as PW-5, who mentioned correctly about the village. The trial Court realizing the factum of the order allowing the amendment, passed the decree in respect of Village Hassan Bhatti, but the Lower Appellate Court ignored the aforementioned order and converted the suit into recovery of the amount and, therefore, there is gross illegality and perversity. The defendants have examined an Expert. The Expert always toes to the lines of the party, who engages him. Preceding to filing of the suit, a legal notice was also sent and, thus, urges this Court for setting-aside of the judgment and decree of the Lower Appellate Court and formulation of the following

substantial questions of law:-

- 1) Whether the judgment and decree of the Lower Appellate Court, being the last Court of fact and law while ignoring the order of the amendment dated 25.4.2003 of the trial Court, is legal and justified?
- 2) Whether the judgment and decree of the Lower Appellate Court in not granting the discretion under Section 20 of the Specific Relief Act, is fair and legal?

Mr.Divyadeep Walia, learned counsel for respondent Nos.1 to 5-defendants submits that the appellant-plaintiff has failed to prove the payment of the earnest money as no copy of the cheque with regard to payment of ₹4,00,000/- has been proved, thus, failed to discharge the onus with regard to the part payment of the earnest money. Despite the order of amendment dated 25.4.2003, no amendment was caused in the pleadings and, therefore, the Lower Appellate Court rightly rejected the discretion and ordered for refund of the earnest money. In this regard, cross-objections have also been filed. The agreement to sell was emphatically denied. The Expert deposed that the signatures of the respondents were not appearing on the agreement to sell. Harpreet Singh had entered into agreement on behalf of the appellant-plaintiff. Readiness and willingness was also wanting and rightly so, the Lower Appellate

Court has set-aside the findings regarding the same and, thus, urges for affirming the findings and dismissal of the appeal.

I have heard the learned counsel for the parties and appraised the paper book.

The operative part of the order dated 25.4.2003 reads thus:-

*“As per report of the reader the proper court fee has been affixed by plaintiff. Therefor suit be registered. The plaintiff has already filed application U/O 6 Rule 17 CPC read with section 151 CPC in regard-the amendment/correctness in the name of village. Heard on application. Ld.Counsel for applicant-plaintiff has stated that name of the village has been inadvertently typed as Kabalwala whereas the correct name of the village is Hassan Bhatti, therefore, amendment/correctness be made in this regard and notice of the present suit is yet to be issued to the defendant. Therefore, no prejudice is going to be caused to the defendant, if the application be allowed. Keeping in view the circumstances, I feel that it is merely typographical mistake and the name of the village has been inadvertently typed as Kabalwala whereas the name of village is Hassan Bhatti as per pleaded if the plaintiff in regard to the land mentioned in the agreement to sell and no prejudice is going to be caused to the defendant, if the said application is allowed because notice is yet to be issued to the defendant. Therefore, application is allowed and reader is directed to make the necessary correction in 8<sup>th</sup> line of the headnote of the plaint*

*and to correct the name of village as Hasan Bhatti instead of village Kabalwala. Thus application stand disposed of. The plaintiff has also filed application U/O 39 rule 1 & 2 CPC read with section 151 CPC. Heard on application. The applicant-plaintiff has not been able to show an immediate threat from the side of the respondent-defendant. Moreover, it is a case where the other party is necessary to be heard before granting the ex parte injunction. Therefore, notice of the suit and application is ordered to be issued on filing PF/RC for 27.5.2003. Dasti summons be given.*

*CJ(SD) 25.4.2003.”*

Before the trial Court, appellant-plaintiff examined the attesting witnesses and as well as Harpreet Singh, who also deposed with regard to the description of the property in village Hassan Bhatti and not qua Village Kabalwala. All the witnesses have deposed that a sum of Rs.9,00,000/- was paid to the defendants. In my view, the onus was shifted upon the defendants to dispel the same by proving the bank account of having not presented the cheque. The defendants have failed in their duty by proving that the cheque had actually not be paid. They were audacious enough to prove on record the statement of the account of the bank held by him.

The Lower Appellate Court, in my view, has committed illegality and perversity in not noticing the aforementioned order,

whereby the application for correction of the village was allowed. In my

**Regular Second Appeal No.4036 of 2011 (O&M)** { 6 }

view, the Lower Appellate Court ought not to have declined the discretion.

There is another aspect of the matter. Preceding to the filing of the suit, legal notice dated 24.12.2002 was served. The target date was 20.12.2002. Suit has been filed in April, 2003. At all, the contents of the notice reiterated in the plaint have not been rebutted. Notice was sent through registered post, therefore, carries a presumption under Section 27 of the General Clauses Act.

In my view, the stand taken in the written statement for the first time with regard to the denial of the signatures is an afterthought.

For the foregoing reasons, the judgment and decree of the Lower Appellate Court is hereby set-aside and that of the trial Court is restored. The suit of the appellant-plaintiff is decreed, whereas the cross-objections are dismissed, resultantly appeal stands allowed.

**August 5<sup>th</sup>, 2016**  
**ramesh**

**( AMIT RAWAL )**  
**JUDGE**

**Whether speaking/reasoned**

**Yes/No**

**Whether Reportable:**

**Yes/No**